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Public Prosecutor v Tay Ee Hung (L)

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HIGH COURT (KUCHING) — CRIMINAL TRIAL NO KCH-45B-4/12 OF 2014
ALWI ABDUL WAHAB JC
1 APRIL 2016

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Criminal Law — Offences — Murder — Requirements to constitute murder — Whether element of death of deceased proven — Whether evidence of prosecution's witnesses consistent and credible — Whether evidence of prosecution's witnesses supported prosecution's case — Whether identification parade conducted on accused flawed — Whether investigating officer conducted investigation with objective mind and free from bias — Whether failure to called witnesses fundamental to prosecution's case — Whether prima facie case proven — Penal Code s 302

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The accused was charged for the offence of murder of the deceased, an offence punishable under s 302 of the Penal Code ('the Code'). Prior to the incident, the deceased's friend, Yahya invited him to celebrate a birthday party at the Silhouette Club ('club') in the Spring Shopping Mall. After the party, the deceased went out from the club and proceeded towards the car park. The incident happened at the car park where the prosecution's witness, Muhadir claimed that he saw the accused pushed the deceased against the wall. He tried to break up the fight between them and in that process; there was exchange of punches between him and the accused. He also saw the accused took out a sharp weapon and used it to slash him. As he ran towards the accused's friend, Ah Heng, he had a chance to look back and saw the accused stabbed the deceased with the same sharp weapon. The scuffle took place between him and Ah Heng for about three to four minutes. When Ah Heng fell off, Muhadir looked back at the direction of the accused and the deceased but both of them were no longer there. Muhadir then left the scene of the incident with his girlfriend. Rizal, another prosecution witness claimed that he saw the accused stabbed the deceased's stomach one to two times using sharp weapon. He also testified that, when the deceased was attacked by the accused, Muhadir went to help him and there was also a scuffle between them. He had also tried to look for the deceased after the incident but he could not locate him. The body of the deceased was later found by PW13 at the open area opposite the Spring Shopping Mall. PW8 who performed the post-mortem stated that the stab wounds were consistent with that the injuries caused by sharp pointed weapon. Subsequently, the accused was charged with murder of the deceased. The accused submitted that there was serious flawed in the way the ID parade was conducted. It was further argued that the investigation officer ('PW14') had

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not done the investigation with an objective mind as he was involved in too many roles apart from being the investigation officer. On the other hand, the prosecution submitted to the court that, one of the witnesses, Yahya was not a material witness to prove its case against the accused.

Held, discharging and acquitting the accused without defence being called:

(1) There was undisputable evidence that the deceased died due to the injuries that were inflicted on him and this was certified and confirmed by PW8 who had conducted a post mortem on him. Thus, the first element of death of the deceased under s 302 of the Code was proven (see paras 15 & 17).

(2) There were clear inconsistencies in Muhadir's evidence in respect of those who were present at the scene. At first, he testified that Ah Heng and other person were at the scene together with the accused but later he said that Ah Heng and another person went back to Silhouette. Further, the fact that he could not identify Ah Heng during the ID parade did not support his story that there was scuffle between him and Ah Heng (see para 19).

(3) Muhadir's evidence that he saw the accused stabbed the deceased when he looked back while running towards Ah Heng was inherently incredible because for someone who had seen the incident, the first thing that he should think of was to help out but instead he proceeded towards Ah Heng for fearing Ah Heng was armed. In the circumstances, a reasonable man would have lodge a police report (see para 20).

(4) The court was not convinced that Rizal was present at the crime scene because if he was, he could have told the court in details as to the fight between Muhadir and Ah Heng. Further, Rizal's evidence that he saw the accused stabbed the deceased raised serious doubts. In court, he said that the accused fought with the deceased and this was the only Chinese man involved. However, based on the evidence, it was clear that Rizal identified the accused's friend, Yu Tze Hung as someone present at the crime scene. The court found that Rizal was not consistent in giving his testimony as he admitted that he had retracted his police report because he did not want to victimise the accused (see paras 21–23).

(5) There was serious flawed in the way the ID parade was conducted. Before the ID parade was conducted, the eye-witnesses were shown with the photograph of the accused when they were grouped together and briefed. Further, the age of the participants in the ID parade were too young or too old compared to the age of the accused which made the accused easily identifiable (see para 26).

(6) The court agreed with the accused that PW14 had put himself in a situation where it could give an impression that the investigation was not

done with an objective mind and free from bias when he was involved in too many roles apart from being the investigating officer in this case (see para 27).

(7) Yahya was a material witness as his involvement in this case was mentioned several times. The prosecution had not exercise their discretion objectively by not calling Yahya as witness because if he was called, he would had given evidence that was unfavourable to the prosecution as he could not identify the accused during the ID parade. There were few other witnesses who were not called by the prosecution. By not calling the witnesses, it would only create doubts in the prosecution case in view of findings of the scientific officer (PW2) on the existence of an unknown male DNA found at the crime scene which could have been the real assailant (see paras 28–30).

(8) As there were doubts in the prosecution case, the evidence of both Muhadir and Rizal also suffered from inherent improbabilities and infirmities, it was not safe to rely on their evidence to convict the accused (see para 31).

[Bahasa Malaysia summary

Tertuduh telah didakwa kerana kesalahan membunuh si mati, kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun tersebut'). Sebelum kejadian, kawan si mati, Yahya telah mempelawanya untuk menyambut majlis hari jadi di Kelab Silhouette ('kelab') di Spring Shopping Mall. Selepas majlis itu, si mati keluar dari kelab itu dan menuju ke arah tempat letak kereta. Kejadian itu berlaku di tempat letak kereta di mana saksi pendakwaan, Muhadir mendakwa bahawa dia telah melihat tertuduh menolak si mati ke dinding. Dia cuba meleraikan pergaduhan antara mereka dan dalam proses itu; berlaku tumbuk-menumbuk antara dia dan tertuduh. Dia juga melihat tertuduh mengeluarkan senjata tajam dan menggunakannya untuk mengelarnya. Semasa dia lari ke arah kawan tertuduh, Ah Heng, dia berpaling untuk meihat ke belakang dan melihat tertuduh menikam si mati dengan senjata tajam yang sama. Pergelutan berlaku antara dia dan Ah Heng selama tiga hingga empat minit. Apabila Ah Heng rebah, Muhadir melihat belakang kearah tertuduh dan si mati tetapi kedua-dua mereka tiada lagi di situ. Muhadir kemudian telah meninggalkan tempat kejadian dengan teman wanitanya. Rizal, seorang lagi saksi pendakwaan mendakwa bahawa dia telah melihat tertuduh menikam perut si mati satu hingga dua kali menggunakan senjata tajam. Dia juga memberi keterangan bahawa, semasa si mati diserang oleh tertuduh, Muhadir pergi membantunya dan pergelutan juga berlaku antara mereka. Dia juga telah cuba mencari si mati selepas kejadian tetapi dia tidak dapat mencarinya. Mayat si mati kemudian telah ditemui oleh PW13 di kawasan terbuka bertentangan Spring Shopping Mall. PW8 yang telah melakukan bedah siasat menyatakan bahawa luka-luka tikaman adalah konsisten dengan kecederaan yang disebabkan oleh senjata bermata tajam.

Berikutan itu, tertuduh telah didakwa membunuh si mati. Tertuduh berhujah bahawa terdapat kecacatan serius dalam cara perbarisan pengecaman dilakukan. Ia dihujahkan selanjutnya bahawa pegawai penyiasat ('PW14') tidak melakukan siasatan itu dengan minda yang objektif kerana dia terlibat dalam terlalu banyak tugasan selain daripada menjadi pegawai penyiasat. Sebaliknya, pendakwaan berhujah kepada mahkamah bahawa, salah seorang daripada saksi-saksi itu, Yahya bukan saksi utama untuk membuktikan kesnya terhadap tertuduh.

Diputuskan, melepas dan membebaskan tertuduh tanpa pembelaannya dipanggil:

(1) Terdapat keterangan yang tidak boleh dipertikaikan bahawa si mati meninggal dunia akibat kecederaan yang dialaminya dan ini disahkan oleh PW8 yang telah melakukan bedah siasat ke atasnya. Oleh itu, elemen pertama kematian si mati di bawah s 302 Kanun tersebut telah dibuktikan (lihat perenggan 15 & 17).

(2) Jelas keterangan Muhadir tidak konsisten berkenaan siapa yang berada di tempat kejadian. Pada mulanya, dia memberi keterangan bahawa Ah Heng dan seorang yang lain berada di tempat kejadian bersama tertuduh tetapi kemudian dia megatakan bahawa Ah Heng dan seorang yang lain telah pergi balik ke Silhouette. Selanjutnya, fakta bahawa dia tidak boleh mengecam Ah Heng semasa perbarisan pengecaman tidak menyokong ceritanya bahawa terdapat pergelutan antara dia dan Ah Heng (lihat perenggan 19).

(3) Keterangan Muhadir bahawa dia telah melihat tertuduh menikam si mati apabila dia melihat ke belakang semasa berlari ke arah Ah Heng memang sukar dipercayai kerana untuk seseorang yang telah melihat kejadian itu, perkara pertama yang dia patut fikirkan adalah untuk membantu tetapi sebaliknya dia terus menuju ke arah Ah Heng kerana takut Ah Heng bersenjata. Dalam keadaan itu, seorang yang munasabah akan membuat laporan polis (lihat perenggan 20).

(4) Mahkamah tidak yakin bahawa Rizal ada di tempat kejadian kerana jika dia ada di situ, dia boleh memberitahu mahkamah secara terperinci tentang pergaduhan antara Muhadir dan Ah Heng. Selanjutnya, keterangan Rizal bahawa dia melihat tertuduh menikam si mati telah menimbulkan keraguan yang serius. Di mahkamah, dia menyatakan bahawa tertuduh telah bergaduh dengan si mati dan ini adalah satu-satunya lelaki Cina yang terlibat. Walau bagaimanapun, berdasarkan keterangan, ia adalah jelas bahawa Rizal telah mengecamkan kawan tertuduh, Yu Tze Hung sebagai seorang yang berada di tempat kejadian jenayah itu. Mahkamah mendapati bahawa Rizal tidak konsisten semasa memberi keterangannya apabila dia mengakui telah

menarik balik laporan polisnya kerana tidak mahu menjadikan tertuduh mangsa (lihat perenggan 21–23).

(5) Terdapat kecacatan serius dalam cara perbarisan pengecaman itu dijalankan. Sebelum perbarisan pengecaman itu dijalankan, saksi-saksi utama telah ditunjukkan gambar foto tertuduh semasa mereka dikumpul bersama dan diberi taklimat. Selanjutnya, umur peserta-peserta dalam perbarisan pengecaman itu terlalu muda berbanding dengan umur tertuduh yang menyebabkan tertuduh mudah dikenal pasti (lihat perenggan 26).

(6) Mahkamah bersetuju dengan tertuduh bahawa PW14 telah meletakkan dirinya dalam keadaan di mana ia boleh memberikan andaian bahawa siasatan itu tidak dilakukan dengan minda yang objektif dan bebas daripada sikap berat sebelah apabila dia terlibat dalam terlalu banyak tugas selain daripada menjadi pegawai penyiasat dalam kes ini (lihat perenggan 27).

(7) Yahya ialah saksi utama kerana penglibatannya dalam kes ini yang disebut beberapa kali. Pendakwaan tidak menggunakan budi bicara mereka secara objektif dengan tidak memanggil Yahya sebagai saksi kerana jika dia dipanggil, dia akan memberikan keterangan yang tidak berpihak kepada pendakwaan oleh sebab dia tidak dapat mengenal pasti tertuduh semasa perbarisan pengecaman. Tidak ramai saksi lain yang dipanggil oleh pendakwaan. Dengan tidak memanggil saksi-saksi itu, ia hanya menimbulkan keraguan dalam kes pendakwaan berdasarkan penemuan pegawai saintifik ('PW2') berhubung kewujudan DNA lelaki yang tidak dikenali yang ditemui di tempat kejadian jenayah itu yang mungkin penyerang sebenar (lihat perenggan 28–30).

(8) Oleh kerana terdapat keraguan dalam kes pendakwaan, keterangan kedua-dua Muhadir dan Rizal juga terjejas akibat ketidakbarangkalian dan kelemahan yang ada, ia tidak selamat untuk bergantung kepada keterangan mereka untuk mensabitkan tertuduh (lihat perenggan 31).]

Notes

For cases on murder, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1911–1919.

Cases referred to

Balachandaran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)

Legislation referred to

Criminal Procedure Code s 180(1), (4)
Penal Code s 302

Mirza bt Mohamad (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.
Shankar Ram (Anthony Tai with him) for the respondent.
Fadzilah bt Osman (watching brief for the deceased family).

Alwi Abdul Wahab JC:

INTRODUCTION

[1] What is supposed to be a birthday celebration party turned tragic when one Zulkarnain bin Mohamad Pauzi ('the deceased') was killed in an alleged fight between the group of four people ie Tay Ee Hung ('Ah Hung'), Yu Tze Hung ('Ah Heng'), Muhadir bin Abdul Rauf ('Muhadir') and another person at large but only Tay Ee Hung ie the accused was implicated for the charge of murder in causing the death of the deceased as he was seen stabbing the deceased by Muhadir and Mohd Rizal bin Talip ('Rizal') who were the prosecution star witnesses ie PW4 and PW7 respectively.

[2] Yu Tze Hung was earlier charged under s 302 of the Penal Code to murder the deceased as the eye witnesses had pin pointed him as the perpetrator during the first identification parade conducted on 20 June 2010. In 2010, Yu Tze Hung was discharged not amounting to an acquittal. Tay Ee Hung was subsequently charged under s 302 to murder the deceased in 2014.

THE CHARGE

[3] The charge (amended) against the accused reads as follows:

> That you on 24th of January 2009, between 2.00 a.m. to 3.00 a.m., at the open area near to Silhouette Restaurant & Bar of the Spring Shopping Mall, Jalan Simpang 3, in the District of Kuching in the State of Sarawak committed murder by causing the death of one Zulkarnain Bin Mohamad Pauzi (No. KP: 850204-13-5945) and thereby committed an offence punishable under section 302 of the Penal Code.

THE FACTS

[4] The prosecution called 14 witnesses to prove that the accused murdered the deceased. The facts established by the prosecution through their witnesses were these. I would start with the evidence of Muhadir where he told the court on that unfortunate day he received a telephone call from Yahya who invited him to celebrate a birthday party at the Silhouette Club ('Silhouette'), the

Spring Shopping Mall. Together with Rizal, the deceased and four others, they went to the said place by using two cars and arrived thereat at 1.30am. Inside the Silhouette, Muhadir seated with Rizal, the deceased and Yahya at the bar counter and after about 20 minutes, Muhadir and Rizal went out of the Silhouette. Outside Silhouette Muhadir seated next to Rizal at the table which Muhadir marked as 'X' in photograph No 2 of exh P4(1–61). Less than half an hour later the deceased also came out of Silhouette and he was seen holding a glass which he suddenly threw at point marked 'Y' indicated by Muhadir in photograph No 2 and 55 of exh P4(1–61). Muhadir further told the court that the deceased asked him and Rizal to go back home while he proceeded towards the car park. On his way to the car park the deceased passed by the accused, Ah Heng and another person, and it was then the three of them came near to the deceased when the accused asked the deceased 'Apa hal bikin hal dekat sini', 'Ini tempat saya jaga'. Upon hearing this, the deceased replied 'Tidak ada apa-apa, tidak mahu buat hal'. According to Muhadir, he was about 30 feet away from where the deceased and the accused were standing.

[5] Muhadir approached the three of them from the accused's back and asked them, 'Apa hal tok? Apa hal tok? Apa hal tok?'. The accused then pushed the deceased towards the wall and there was a scuffle between the accused and the deceased at first when Muhadir joint in pushing the accused to the wall to break up the fight between the accused and the deceased. In that process, there was an exchange of punch between Muhadir and the accused.

[6] During the scuffle Muhadir saw the accused took out a sharp weapon which he described as straight and a bit curve approximately four inches in length from the right pocket of his trousers and used it to slash Muhadir. As events unfolded Muhadir saw Ah Heng ran towards him and the deceased and as he ran towards Ah Heng, he had a chance to look back and saw the accused stabbed the deceased at the stomach with the same sharp weapon at the distance of about two metres. Muhadir marked the place where he saw the accused stabbed the deceased as 'B' in photograph No 5 of exh P4(1–61).

[7] According to Muhadir, the scuffle took place between him and Ah Heng for about three to four minutes. During that scuffle, Ah Heng fell off that was when he saw towards the direction of the accused and the deceased but both of them were no more there. Muhadir saw a trail of bloods starting from point B in photograph No 5 of exh P4(1–61) towards car park which can be seen in photograph No 7 of exh P4(1–61). The situation at Silhouette after the fighting becomes unruly and people are running, said Muhadir. He then entered his car before leaving the place of incident with his girlfriend, Bibi.

[8] Rizal's testimony was that he saw the accused stabbed the deceased's stomach one to two times using sharp weapon. When the accused attacked the

deceased, Muhadir went to him in order to help him. There was also a scuffle between Muhadir, the accused and the deceased. He said he could not locate the deceased although he had made the effort to look for him after the alleged stabbing incident.

POST-MORTEM

[9] The body of the deceased was found by Muhammad Fadhlan bin Abdullah ('PW13') at around 8am on 24 January 2009 at the open area right in front of Ko-Perkasa building opposite the Spring Shopping Mall. Dr Norliza Ibrahim ('PW8') who performed a post-mortem on the deceased certified that the cause of the deceased's death was chest and groin injuries due to sharp force trauma. According to PW8, the incisions and stab wounds injuries suffered by the deceased were consistent with that of the injuries caused by sharp and pointed weapon or object such as a knife, sword or any similar object. PW8 prepared and documented her findings in the post mortem report (exh P49).

THE DUTY OF THE COURT AT THE CONCLUSION OF THE PROSECUTION CASE

[10] Section 180(1) of the Criminal Procedure Code ('the CPC') provides that when the case for the prosecution is concluded, the court must consider whether the prosecution has made out a prima facie case against the accused. Meanwhile s 180(4) of the CPC provides that a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[11] Based on the established principle of law, before the court can rule that a prima facie case has been made out, a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution (*Balachandaran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[12] By maximum evaluation, it means the assessment process for the essential purpose of analysing the credibility and reliability as well as trustworthiness of the evidence of the prosecution. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation; any evidence which is not safe to be acted upon should be rejected (*Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209).

[13] Thus, what is required by a trial court is to test the evidence of a witness from all angles as well as its reliability and credibility by taking into account the

entire evidence placed before the court. The evidence must not be accepted at face value but has to be tested and evaluated to ascertain whether it suffers from any infirmities, gaps and contradictions before reliance can be placed on the particular evidence. Further, the trial court has the duty to consider the evidence which favours the defence. This requires a consideration of the existence of any reasonable doubt in the case for the prosecution and if there is any such doubt, there can be no prima facie case (*Balachandran v Public Prosecutor*).

[14] The above principle of law on maximum evaluation should be read together with the principle relating to judicial appreciation of evidence which is set out in the following words of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97:

> A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

INGREDIENTS NEED TO BE PROVED UNDER SECTION 302 OF THE PENAL CODE

[15] To prove the charge against the accused it is incumbent on the prosecution to prove the following ingredients:

(a) the death of Zulkarnain bin Mohamad Pauzi ('the deceased');

(b) that the deceased died in consequence of the act of the accused;

(c) that such act was done:

  (i) with the intention of causing death;

  (ii) with the intention of causing such bodily injury as:

    (1) the accused knew it was likely to cause death; or

    (2) was sufficient in the ordinary cause of nature to cause death; or

    (3) was known to him to be so imminently dangerous that it must in all probability cause (a) death; or (b) such bodily injury as is likely to cause death; and

    (4) the accused having no excuse for incurring the risk of causing such death or injury.

The analysis of evidence at the end of the prosecution's case

[16] Having set my mind as to what is required of me at this stage, I shall now subject the prosecution's evidence to the above test as expounded by the case law authorities.

First ingredient: The death of Zulkarnain bin Mohamad Pauzi ('the deceased')

[17] In respect of the first element there is undisputable evidence that the deceased was one Zulkarnain bin Mohamad Pauzi. There is also undisputable evidence that the deceased died due to the injuries that were inflicted on him. The deceased's cause of death was certified and confirmed by PW8 who conducted a post-mortem on the deceased. The first element is therefore proven.

Second ingredient: The deceased died in consequence of the act of the accused

[18] The evidence in respect of this element comes almost solely from the direct evidence of Muhadir and Rizal. Since the exercise of assessing the credibility of prosecution witnesses cannot be postponed to a later stage, I must subject the evidence of these star witnesses to the maximum evaluation test.

Inconsistency in Muhadir's evidence on those who were present at the crime scene

[19] On that day, it was Muhadir's evidence that Tay Eee Hung, Yu Tze Hung and another person had approached the deceased when Muhadir came to the deceased's rescue upon seeing Tay Ee Hung pushed the deceased to the wall. He further stated that when the scuffle took place between three of them (the deceased, the accused and Muhadir), the other two ie Ah Heng and another person ran towards Silhouette and they were not at the scene. Muhadir was asked to give explanation to his earlier evidence that Ah Heng and the other person were at the scene together with the accused but later he said that Ah Heng and another person went back to Silhouette. Muhadir maintained his evidence that Ah Heng and the other person were not at the scene during the scuffle between the three of them ie Muhadir, the accused and the deceased (pp 121–122 NOP). There appears to be clear inconsistencies in Muhadir's evidence in this respect of those who were present at the scene. We must not lose sight of his evidence that there was also a scuffle between him and Ah Heng that happened for three to four minutes which means that Ah Heng was also present at the scene. The fact that he could not identify Ah Heng during the ID parade on the 20 June 2010 did not support his story that there was scuffle between him and Ah Heng. This is because if there was any truth of what he said, he should be able to identify Ah Heng as he would have had a good look at Ah Heng's face for three to five minutes during the alleged scuffle. However,

it came as a surprised that Muhadir could identified Ah Heng in court on 30 July 2015, after more than six years later when he failed to identify the same person on 20 June 2010 some 17 months after the incident took place on 24 January 2009.

Muhadir's evidence is inherently incredible

[20] Apart from the above serious inconsistencies, Muhadir's evidence that he saw the accused stabbed the deceased when he looked back while running towards Ah Heng, in my view was so inherently incredible because for someone who had seen the stabbing incident done to his dear friend which had serious consequences, the first thing that he should think of is to help out but in this case he proceeded towards Ah Heng for fearing that Ah Heng was armed. Having found that Ah Heng was not armed he again ignored what had happened to the deceased and continued to engage in a fight with Ah Heng when he noticed both the accused and the deceased were no more there at the crime scene. What a reasonable man should have done in the circumstances of this case is to lodge a police report immediately after the incident especially when it involves a criminal act and the life of a human being. Yet, Muhadir went back home with his girlfriend, Bibi to sleep as if nothing happened and claimed to have made three police reports six months after the incident but none of the reports was produced before the court.

Serious doubts in Rizal's evidence

[21] Muhadir in his evidence did not at any times mention about the presence of Rizal at the crime scene when the stabbing and scuffling took place between Muhadir, the deceased and the accused. However, Rizal's testimony was he saw the accused stabbed the deceased's stomach one to two times using sharp weapon. He testified that when the accused attacked the deceased, Muhadir went to help him. I am not so convinced if Rizal was present at the crime scene because if he was he could have told this court in details as to the fight between Muhadir and Ah Heng as well. Rizal's evidence contradicts the evidence of Muhadir in that Muhadir did not go to the deceased when he was stabbed. If Rizal was there at the crime scene he could have easily seen the fight between the deceased and the accused and where they went to after the stabbing since he was just a bystander unlike Muhadir who was engaged in a fight with Ah Heng at that time. If he was there he would not have stated in the ID parade exh D1 (para 14.2) that he did not know the role played by Yu Tze Hung at the crime scene.

[22] Rizal's evidence that he saw the accused stabbed the deceased raised serious doubts. In court, he said the accused fought with the deceased and this is the only Chinese man involved. However, in exh D1 at para 14.2, it is clear that Rizal could identified Yu Tze Hung as someone at the crime scene although

he could not remember the role played by Yu Tze Hung. The allegation by Rizal to implicate the accused as the one who stabbed the deceased being the only Chinese man involved in the fighting contradicts the identification which he made during the ID parade (exh D1) on Yu Tze Hung whom he identified as someone present at the crime scene. Contrary to exh D1, in court he testified that he did not know Yu Tze Hung. I have observed Rizal when he gave evidence in court and I find that this witness is not consistent in giving his testimony especially during cross-examination as shown in the following evidence:

> PUT: Saya katakan kepada kamu sekarang rekod ini kawat cam yang dibuat keatas Yu Tze Hung menunjukkan bahawa pada 20.6.2010 kamu memang sudah mengecam seorang Cina yang lain bernama Yu Tze Hung dan keterangan kamu di Mahkamah hari ini mengatakan hanya ada satu orang Cina yang bergaduh dengan si mati itu adalah keterangan palsu, setuju?
>
> A: Setuju.
>
> (p 331 of the notes of proceeding)

[23] This uncertainty of his evidence in court is reflected by his own admission that he had retracted his police report in exh D9 because he did not want to victimise the accused. His evidence on the retraction as witness to this case is reproduced as follows:

> PUT: Kamu sebenarnya menarik balik kes ini sebab mengikut Ex. D9 kamu tidak mahu menganiayai si tertuduh atas tuduhan membunuh, setuju?
>
> A: Betul.
>
> (p 333 of the notes of proceeding)

[24] When Rizal was asked which part of the deceased's body that was stabbed by the accused and he confidently answered it was on the right side. When further cross-examined by Mr Ram, the learned counsel for the accused, he changed his version by saying that the deceased was stabbed on his left stomach and the accused used his right hand to stab the deceased. Rizal's explanation to this contradiction was that he did not understand Mr Ram's question. Further, Rizal was asked what weapon was used by the accused which he answered that he wasn't sure and later told the court it was 'taji ayam' as what people told him. If Rizal really saw what he claimed to see he should be able to say for sure the type of weapon that was used by the accused to stab the deceased. While I could accept his explanation for he might be confused with the question posed to him earlier on the part of the deceased's body being stabbed but by telling the court that the accused was using 'taji ayam' based on what people told him is something I couldn't accept for the simple reason that it was hearsay and therefore inadmissible.

PW5 and PW6's evidence do not support the prosecution's case

[25] Both PW5 (Timmy ak Albert) and PW6 (Abang Mohd Muhaimi Abang Muas) had lodged police reports exhs D5 and D6 to state their intention to withdraw themselves as witness for they were unsure on the involvement of the accused in this case. Based on their police reports, they stated that the evidence that they shall give might not be accurate and the accused would be victimised due to the wrong evidence. Both PW5 and PW6 also told the court that they were prompted by the newspaper article (exh D13) with the picture of the accused shown by DSP Naazron (PW14) before the ID parade on the accused Tay Ee Hung on 16 July 2014.

The ID parade conducted on the accused Tay Ee Hung on 16 July 2014 was unfair and fundamentally flawed

[26] I agree with Mr Ram's contention that there was serious flawed in the way the ID parade was conducted. First as testified by PW5 and PW6 that the purported eye-witnesses were shown with the photograph of the accused when they were grouped together and briefed before the ID parade was conducted which led to positive identification of the accused. Secondly, it was a matter of fact that the age of the participants in the ID parade were either too young or too old (between 16–52 years) compared to the age of the accused which also made the accused easily identifiable. Further, the accused was the only one bald and wearing different clothing as he was in police custody. Inspector Alias bin Nen (PW10) who conducted the ID parade admitted that the ideal age of the participants in the ID parade should be in the range between the 20–30 years old of Chinese descent and their height must be more or less the same with the accused. In view of the procedures adopted and the selection process of the participants in the ID parade were unfair and fundamentally flawed, it leaves the impression that the accused may have been wrongly implicated and charged in the present case. I could see the reasons why both PW5 and PW6 and the other purported eye-witnesses turned back and changed their evidence by lodging the police reports (exhs D5, D6, D7, D8 and D9) to withdraw their allegation against the accused.

The multiple roles of the investigation officer DSP Naazron (PW14)

[27] By PW14's own evidence, apart from being the investigating officer, he also recorded the statement from the purported eyewitnesses. He was also involved in the ID parade where he gave a briefing to the eye-witnesses before the ID parade was done. He also played a role in collecting the blood swabbing and exhibits at the crime scene and later sent them to the chemist department for analysis. In this respect, I find that the complaint made by learned counsel has some basis. By getting involved in too many roles apart from being the

investigating officer in this case, PW14 has put himself in situation where it could give an impression that the investigation was not done with an objective mind and free from bias.

Failure to call Yahya bin Junaidi and other witnesses to testify

[28] I agree with the prosecution that they have the discretion to call any witness to prove its case. However, I disagree when the prosecution submitted that Yahya is not a material witness to prove its case against the accused. In my view, Yahya ought to be called as he was the one who invited Muhadir and the rest to come to the Silhouette that night. There was also an evidence that Muhadir went out of the Silhouette after Yahya had an argument with one Indian inside the Silhouette. There was also evidence by Rizal, that Yahya had threatened him not to give evidence in court as shown in exh P47. Yahya's involvement in this case were mentioned several times and he was also summoned as witness to the ID parade conducted on the accused. Despite being present at the scene, Yahya could not identify the accused during the ID parade, the possible reason why he was not called. This only goes to show that the prosecution had not exercise their discretion objectively by not calling Yahya because if Yahya is called he would have given evidence that is unfavourable to the prosecution.

[29] It is settled law that the burden is on the prosecution which remained throughout the trial to prove the guilt of the accused. In the present case, there are few witnesses who were not called namely, Yu Tze Hung, the other person who was alleged to be with the accused and Yu Tze Hung when the three of them approached the deceased and one Tan Yu Heng who sought medical treatment at Kuching Specialist Hospital shown in exh D14.

The unknown male DNA

[30] By not calling the abovenamed witnesses, it would only create serious doubts in the prosecution case in view of the findings of the scientific officer ie Phoon Yoong Keat (PW2) on the existence of an unknown Male DNA found at the crime scene shown by exhs P14 (1–6) and P19 (1–3) and this unknown male could have been the real assailant in the present case. These doubts ought to be resolved in favour of the accused person.

CONCLUSION

[31] In the premises, based on the above considerations, not only that there are doubts exists in the prosecution case, the evidence of both Muhadir and Rizal also suffer from inherent improbabilities and infirmities. I find that their

evidence are not safe to be relied upon to convict the accused if he remained silent, which in the result, no prima case has been made out. I acquit and discharge the accused accordingly.

Accused discharged and acquitted without his defence being called.

Reported by Dzulqarnain Ab Fatar